Dissenting Report by Labor Senators

Background and overview

1.1 This bill seeks to introduce the controversial 'effects test' into Australia's consumer law.

1.2 The proposal was recommended by the government's Harper Competition Policy Review. The effects test would be in addition to the current purpose test that exists in section 46 of the *Competition and Consumer Act*.

1.3 As part of this bill, the government also proposes to repeal the telecommunications specific anti-competitive conduct provisions in Part XIB of the Act. The basis of this decision is that the general effects test will apply to all industry sectors and therefore Part XIB is no longer necessary.

1.4 Labor has publicly stated the effects test—including in Shadow Treasurer Bowen's op-ed—is a particularly dangerous economic policy. By holding companies accountable for their effect on competition, rather than examining the purpose of their conduct, competition between businesses could be dulled.

1.5 Lower levels of competition leads to higher prices, poorer quality products and generally lower living standards for the Australian community.

1.6 Since 1976, 12 Australian competition reviews have considered implementing an effects test. Ten of these reviews have recommended against it.

1.7 Critics also include Graeme Samuel (former ACCC Chairman), Peter Costello, the Business Council of Australia, and reportedly Malcolm Turnbull when the matter was considered (and rejected by) the Abbott cabinet.

1.8 Furthermore, the effects test is worded in such a way that makes it subject to numerous legal challenges.

Public comments on the effects test

1.9 Council of Small Business Australia (COSBOA):

> With the current legislation before the Senate, we are concerned that the wording…will create a 'lawyers picnic' as predicted by the opponents of the effects test. The wording needs to be removed or changed to be clearer in what is the intent of the legislation and make court challenges less likely.

1.10 The Hon Peter Costello, former Treasurer:

> When you are looking at competition policy there is one basic question you have to ask before you can settle anything else: who is competition policy for?
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> If you take the view that competition is there for the consumer, which is what I believe is the fact, everything else will fit into place,
>
> That's why I'm against the so-called effects test. The so-called effects test is designed to protect competitors, particularly less efficient ones, from a competitive challenge.

1.11 The Hon Craig Emerson, former Minister for Competition Policy and Consumer Affairs:

> But the objective of competition laws should be to protect the competitive process, not competitors. Indeed, the stated object of the Competition and Consumer Act 2010 is to enhance the welfare of Australians by promoting competition. While section 46 of the act refers to protecting competitors, the courts have interpreted this to mean protecting competition, consistent with the act's object.

1.12 Mr Graeme Samuel, former ACCC Chairman:

> Under the Harper amendment, businesses would curb their competitive behaviour because of the legal risk. This would have drowned the commercial activity of big business in a sea of uncertainty. Lawyers and economists would need to sit at the right hand of business CEOs to guide them on the legality of every significant transaction.

1.13 Mr Craig Kelly, Liberal MP for Hughes:

> It is not an effects test; its effect is to substantially lessen competition. It is not what you think it is it; it is a Trojan horse.

Comments from written submissions

1.14 Retail Council of Australia:

> A key concern of the Retail Council remains that pro-competitive practices may inadvertently be captured in the new s.46 or, more likely, that businesses may be deterred from making what would be pro-competitive decisions that benefit consumers because they fear being accused of breaching s.46.
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> In summary, the Retail Council remains concerned about the changes to s.46 as proposed in Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 and urges the Government to reconsider its position and leave s.46 of the CCA unchanged.

1.15 Housing Industry Association:

> Although the current law already allows the court to infer harmful 'purpose' from conduct, the amendments under the Bill will enable the Courts (and ACCC) to now explicitly look at the “effect” of market conduct rather than its 'misuse'. This represents a fundamental change with potentially adverse consequences for competition and innovation.
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> If firms were to be required to cease competing in a market at the point where weaker competitors might possible fail, that market would become moribund and competition would cease to provide consumers with the benefits it should.
>
> This is inconsistent with competitive, productive and efficient markets.

1.16 MinterEllison:

i. the purpose of conduct will become determinative of s46 liability for any firm with market power. That would both amplify the inappropriate forensic focus of the section on company communications and lead in all likelihood to over-capture of conduct. Purpose is relevant, but alone ought not be determinative of liability for companies with market power.

ii. there is a real risk that removing the 'take advantage' element and so relying on a competition test as the only filter sorting good from bad conduct for firms with market power will not give sufficient certainty for businesses to be able confidently to proceed with normal pro-competitive conduct.

1.17 BlueScope Steel:

BlueScope is now concerned that its commercially legitimate and pro-competitive activities directed at these objectives may be impacted inadvertently by the proposed changes to section 46. This could perversely lead to higher prices for consumers and threaten BlueScope's continued viability as a domestic steelmaker.

1.18 Business Council of Australia:

Contrary to the government's intentions, the new law will be costly and disruptive for business and risks harming innovation and price discounting, thereby working against the interests of consumers. It will increase regulatory risk at a time of weak business investment and economic growth. If the provision is to proceed, it should be amended to send a clear signal to all businesses that competitive behaviour that is good for consumers will be unambiguously protected under Australian law.

Specific measures

1.19 Labor Senators believe that this legislation enacts dangerous economic policy that risks making businesses afraid to compete which ultimately hurts consumers.

1.20 This bill will create a legal risk every time a business seeks to lower prices for their customers. Consumers are the losers here.

1.21 Labor Senators are not the only group warning of a 'lawyer's picnic' if this bill passes. As noted previously, the small business lobby group COSBOA themselves stated they 'are concerned that the wording…will create a 'lawyers picnic' as predicted by the opponents of the effects test'.

1.22 Furthermore, this bill does not address a prominent problem with the operation of section 46 which relates to private parties litigating breaches of the competition law. Namely, the risk of significant adverse cost orders should an applicant lose as well as the time taken to finalise action in the Courts.

1.23 This issue was addressed by the Harper Competition Review that found small business access to remedies to be wanting, stating:

> From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws

1.24 Alternative options, such as allowing judges in the Federal Court to waive liability of adverse costs to small business private litigants will empower private litigants under Part IV of the *Competition and Consumer Act* to bring litigation without the burden of prohibitive legal fees.

1.25 Labor Senators oppose the government's proposed repeal of Part XIB. Given the concentrated nature of the telecommunications market, it remains appropriate to preserve Part XIB in order to both retain adequate deterrence and facilitate speedy action against anti-competitive conduct in the sector if it arises.

1.26 Labor Senators consider the stronger mechanisms available under Part XIB are still necessary to deter misuse of market power by Telstra, and potentially NBN Co in the future.

Conclusion

1.27 Labor welcomes strong competition policy but it must be informed and enforced. The government's package is neither.

1.28 These changes will deter job-creating investment in Australia by adding to the new layers of red tape and barriers to investment which have already been imposed by the Liberal-National Government.

1.29 The Turnbull Government's proposed effects test is a move to satisfy internal politics. This is not about policy. A level headed analysis of the effects test shows Malcolm Turnbull is using competition policy as a political prop.

1.30 Barnaby Joyce has become the government's chief economic spokesperson. This bill is detrimental to the Australian consumers and the broader economy.

1.31 The proposed repeal of anti-competitive conduct provisions in Part XIB will weaken important safeguards necessary for the proper functioning of the telecommunications market.

Recommendation 1

1.32 That the Senate should not pass the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales